SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 136

THE WESTERN PACIFIC RAILROAD COMPANY,
APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

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Attorney for Appellant.

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Cases.

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No. 168.

THE WESTERN PACIFIC RAILROAD COMPANY,
APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

Statement.

This was a suit by the appellant, as final carrier, to recover amounts withheld by the accounting officers of the Government as land-grant deductions in settlements for interline interstate movements of personal effects of Government officers on Government bills of lading.

This case is similar to No. 166, *Oregon-Washington Railroad and Navigation Company vs. United States*, and other cases pending in the Court of Claims, but is *sui generis*, in that the Western Pacific Railroad was not completed and in operation until 1910, and that the suit embraced all of its

dealings with the Government as final carrier of interline interstate shipments of personal effects of Government officers, so that there is absent the element of previous course of dealings relied upon by the Government, and in that there was introduced specific evidence as to the presentation of voucher at full tariff rates for the first shipment and requirement by the disbursing officer that such voucher be revised and subsequent vouchers presented in accordance with the settled ruling of the Comptroller of the Treasury requiring the application of land-grant deduction, upon which evidence the court below made findings of fact (Findings X-XIII, Record, pp. 13-14), which will be referred to later.

The court below held (and we assume that the Government here concedes) that land-grant deductions were not applicable to the shipments in question, but reached the conclusion that the railroad, by revising its first voucher and presenting subsequent vouchers in accordance with the Comptroller's ruling and receiving the amounts which the disbursing officer under such ruling was permitted to pay, estopped itself from claiming the balances to which it was entitled.

It appears, however, that the form in which the vouchers were prepared and submitted and the situation now presented are attributable solely to the governmental regulations requiring a uniform bill of lading for Government shipments (Finding VI, Record, pp. 10-11; and see form in full in Finding V in No. 166) and requiring, as a condition of payment, the presentation of a so-called voucher in prescribed form, one for cases not involving land-grant mileage and one for cases involving land-grant mileage, either directly or through the so-called equalization agreements (Finding VII, Record, p. 12; and see full form of land-grant voucher in Finding V in No. 166); and to the fact that such vouchers when paid constituted the disbursing officers' acquittance in the settlement of his accounts and could properly be paid

only when they stated amounts authorized by decisions of the Comptroller (Finding XI, Record, pp. 13-14).

Upon the back of the form of bill of lading appeared the following conditions and instructions:

"**Conditions.**

"It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of freight charges will in no case be demanded by carriers. Upon surrender of this bill of lading duly accomplished payment will be made to the last carrier, except where otherwise specifically stipulated.

"2. For railway transportation this bill of lading is subject to all the conditions of the uniform or standard bills of lading, and for express shipments to all the conditions contained in the standard form of receipt issued by express companies, except as otherwise specifically provided hereon.

"3. *Shipments made upon this bill of lading shall take the rate provided for shipments made upon the uniform or standard bills of lading or standard receipts.* * * *

"**Instructions.**

"1. Government property will be transported on the prescribed form of Government bill of lading, which will be identified by serial numbers.

* * * * * * *

"3. When shipments are made under contract or special rates, notation of such fact should appear on the face of the bill of lading.

"4. Officers charged with the duty of providing or securing Government transportation should familiar-

ize themselves with land-grant railroads in order that shipments may be made at the lowest rates available to the Government by the use of such lines, or lines equalizing rates therewith.

* * * * * * *

"7. Public property may be delivered by any Government officer or agent to the Quartermaster's Department of the Army, which will ship the same under its regulations. (23 Stat., 111.)

"8. Only one copy of a bill of lading will be issued for a single shipment. This bill, when receipted by the agent of the receiving carrier, will be returned to the consignor and by him mailed to the consignee, who will, upon receipt of the shipment, accomplish and surrender the bill to the last carrier. *This bill then becomes the evidence upon which settlement for the service will be made.* * * *"

The form of voucher for use in cases involving land-grant mileage provided columns for entry of class symbol, bill of lading date and number, initial point of shipment and destination, mileage, total and land-grant, class or commodity, weight, rate, gross amount, amount to be deducted account of land grant, and amount claimed, and required the following certificate:

"I certify that the above account is correct and just; that the services have been rendered as stated; that payment therefor has not been received, and that the rates charged are not in excess of the lowest net rates available for the Government, based on tariffs effective at the date of service.

.....

(Name of transportation company.)

Per .....

(Name and capacity.)"

Upon the back of the form of so-called voucher appeared the following, among other, instructions:

> "3. Payment for transportation of freight will be made to the last carrier, unless otherwise provided in the bill of lading, upon the voucher form accompanied by the corresponding accomplished bills of lading," etc.

All of the settlements of charges for freight shipments where the Western Pacific Railroad was the final carrier were made by the office of the depot quartermaster at San Francisco (Finding X, R., p. 13), and such accounts were handled for the railroad by one McLean, head of the freight-revising bureau in the office of the general auditor of the railroad at San Francisco. In Finding XIII (R., p. 14) the court below presents the testimony of McLean as to the first and subsequent settlements for shipments up to March 18, 1915 (covering items of claim amounting to $5,760.89, which it rejected), as follows:

> During this period it was the practice of said McLean to revise the bills of lading and apply the rates applicable on the traffic at commercial rates, make the land-grant deduction and compute the freight charges at the net rate. After a month's bills of lading had been revised it was his practice to check up with the quartermaster's office and adjust differences, where there were any differences, as to the correct charges. He then caused the claims to be stated on the prescribed voucher form and after being signed they, with the bills of lading attached, were forwarded to the quartermaster for payment. It appears that to the best recollection of said McLean he stated the first of these claims, during this period, at commercial rates, but being informed by the quartermaster's office of the applicability of land-grant rates under the holding of the Comptroller and the established practice he restated the claim on a land-grant basis. It further appears that he had just come to the service of the plaintiff; that he had had no experience

> in the rendering of bills for Government transportation; that as soon as he learned the custom with reference thereto he rendered bills for transportation of the character here involved, at land-grant rates and continued to do so during all of said period. The rendering of the bill referred to at commercial rates, if in fact he so rendered it, was due to his ignorance of established practice and not because of any intention to question the propriety of the practice or to claim as a matter of right the application of commercial rates. It is not shown that at any time during this entire period he ever questioned the application of land-grant rates to such transportation or protested any settlements on that account, but all bills rendered by him, except as stated, were rendered at land-grant rates, and when so rendered he did not expect any further compensation and never expected compensation at other than land-grant rates until after the decision of the *Chicago, Milwaukee and St. Paul* case by this court.

In its opinion in the Oregon-Washington Railway and Navigation Company case (Record in No. 166, at p. 25) the court below concedes that it would have been fruitless to state the vouchers at tariff rates and appeal to the auditor and in turn to the Comptroller, saying:

> "As to this procedure it is argued that it would have been fruitless because the auditor would have made the settlement at land-grant rates, disallowing the excess, and it was understood to be useless to appeal to the Comptroller. *True enough; and so far as payment was concerned the result would have been the same.*"

Although not specifically so stated in the findings, all of the movements involved originated east of Salt Lake City and were received by the Western Pacific at that point and transported to San Francisco, so that this case involves only interstate movements.

Items of claim covering shipments subsequent to March 18, 1915, amounting to $851.78, were allowed (Finding XIV, R., p. 15) and judgment therefor entered, from which the Government has not appealed.

ARGUMENT.

We are here concerned with the case of a final carrier of interline interstate movements, and it is immaterial whether land-grant mileage was directly involved in any movement embraced in the claim, or whether the shipments were routed entirely over non-land-grant lines. In the first case the land-grant factor would be injected by the land-grant act applicable. In the latter case the land-grant factor would be injected solely by the equalization agreements entered into by the railroads generally with the Quartermaster General, whereby they agreed to accept

> "for the transportation of property moved by the Quartermaster Corps, United States Army, and for which the United States Government is *lawfully entitled to reduced rates over land-grant roads*, the lowest net rates *lawfully available* as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement."
>
> Finding V, R., p. 10

Thereby the railroad companies accorded the United States reduced rates, as authorized by section 22 of the Interstate Commerce Law, but only as to *property* "for which the United States is *lawfully* entitled to reduced rates over land-grant roads," and such reduced rates to be the "lowest net rates *lawfully* available as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement."

As we are concerned here only with property for which the United States is *not lawfully* entitled to reduced rates over land-grant roads, both the land-grant acts and the equalization agreements disappear from the equation, and there remains the plain case of shipments made at the published tariff rates, on account of which the claimant, as the final carrier, has been paid less than the full amount and is suing for the difference.

I.

Before the passage of the Interstate Commerce Law the last carrier of an interline shipment was, as a matter of general railroad law, entitled to hold a lien and sue for the total freight charge.

2 Hutchinson on Carriers, 3d ed., sec. 826, p. 920.
2 Moore on Carriers, 2d ed., sec. 13, page 683.

> "The plaintiff, as the last carrier of the freight, was entitled to collect the lawful charges of its preceding carriers. This is a right long sanctioned by law and custom and is founded in public convenience and common sense. Travis *vs.* Thompson, 37 Barb., 236; Merrick *vs.* Gordon, 20 N. Y., 93. In the case last cited Judge Comstock said: 'The freight being entire for the whole distance between New York and Cleveland, was not due until the goods arrived there. It was then due to the plaintiffs (the last carrier) because they were then the carriers having the goods at their destination subject to the charge. When the defendant received them he promised in judgment of law, if not in fact, to pay the amount of that charge and on that promise the suit is founded.'"
>
> New York Central R. Co. *vs.* Weil, 119 N. Y. Suppl., 676, 678.

Under the Interstate Commerce Law the final carrier is not only empowered to collect the through charge, but is burdened with the duty and obligation of collecting the full published tariff rate and is powerless to relieve or release a shipper or consignee from any part of the same.

In Poor *vs.* C., B. & Q. Ry. Co., 12 I. C. C., 418 (1907), the Interstate Commerce Commission stated the law as declared in decisions of this court (syllabus):

> "1. The published rate governing transportation between two given points, so long as it remains uncanceled, is as fixed and unalterable by the carrier as if that particular rate had been established by a special act of Congress. *When regularly published, it is no longer the rate imposed by the carrier, but the rate imposed by the law.*
>
> "2. Regardless of the rate quoted or inserted in a bill of lading, the published rate must be paid by the shipper and actually collected by the carrier. The failure on the part of the shipper to pay or of the carrier to collect the full freight charges, based upon the lawfully published rate for the particular movement between two given points, constitute a breach of the law and will subject either one or the other, and sometimes both, to its penalties. Not even a court may interfere with a published rate or authorize a departure from it when it has voluntarily been established by the carrier.
>
> "3. While shippers largely rely upon the rates quoted by freight agents and billing clerks, the law charges them with knowledge of the lawful rates. And they will not be heard, before this Commission, to claim the benefit of a lower than the lawful rate on the ground that some railroad clerk has made a mistake in quoting a lower rate for a particular shipment. To permit shippers to impute negligence to carriers in quoting rates and on that ground to enjoy the rate quoted instead of paying the lawfully published rate would open the way for the payment of rebates and might, in practical results, work a repeal of the law."

See the full discussion of the subject at pages 421-424.

And see I. C. C. Conference Rulings, 16, 156, 262, and 314.

And for full citation of authorities see 4 Federal Statutes Annotated, Second Edition, p. 415, VI, Effect of Published Rates, and p. 416, 3, Contracts of Transportation.

Upon the particular point here involved it will suffice to notice the case of Louisville and Nashville R. Co. *vs.* Maxwell, 237 U. S., 94, where the railroad company's agent at Nashville sold Maxwell two tickets to Salt Lake City and return, for $49.50 each, when the published tariff rate over the lines by which the tickets were routed was $78.65. Afterward the railroad company sued Maxwell for the difference. This court, sustaining the right of recovery, said (pp. 97-98):

> "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination. * * *
>
> "The scope and effect of the provisions of the statute as to filing tariffs (both in their present form and as they stood prior to the amendments of 1906), have been set forth in numerous decisions. Gulf, Col. & Santa Fe Rwy. *vs.* Hefley, 158 U. S., 98; Tex. & Pac. Rwy. *vs.* Mugg., 202 U. S., 242; Tex. & Pac. Rwy. *vs.* Abilene Cotton Oil Co., 204 U. S., 426, 445; Armour Packing Co. *vs.* United States, 209 U. S., 56, 81; N. Y. C. & H. R. R. *vs.* United States, 212 U. S., 500, 504; Chicago & Alton R. R. *vs.* Kirby, 225 U. S., 155, 166; Illinois Central R. R. *vs.* Henderson Co., 226 U. S., 441; Kansas Southern Rwy. *vs.* Carl, 227 U. S., 639, 653; Pennsylvania R. R. *vs.* International Coal Co., 230 U. S., 184, 197; Boston & Maine R. R. *vs.* Hooker, 233 U. S., 97, 110-113; George N. Pierce Co. *vs.* Wells, Fargo & Co., 236 U. S., 278, 284. In the Mugg Case, *supra*, it appeared that a rate, less than the lawful scheduled rate had been quoted to the shipper by the agent of the railroad. The shipper had relied upon

the quoted rate in making his shipments and sales. But it was held that he was bound to pay the established rate and was not entitled to the delivery of the goods without such payment. This was upon the ground that it was beyond the power of the carrier to depart from the filed rates and that the erroneous quotation of the rate by its agent did not justify it in making a different charge from that which was lawfully applicable to the shipment. As was said in Kansas Southern Rwy. *vs.* Carl, *supra:* 'Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be compelled to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid.' It was 'the purpose of the act to have but one rate, open to all alike and from which there could be no departure.' Boston & Maine R. R. *vs.* Hooker, *supra*, p. 112. The rule is applicable to the transportation of passengers and their baggage. *Id.*"

The provision in section 22 of the Interstate Commerce Law "that nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments," etc., is special authority for carriers to depart from established tariff rates (I. C. C. Conference Ruling 208*e*), and extends only to Government property (I. C. C. Conference Rulings 33, 36 and 452.) The fact that the Government assumes the freight charge is immaterial (I. C. C. Conference Rulings 107, 431).

And that the Government recognizes that (except as provided in section 22) it is reciprocally bound by, and entitled to the benefit of, the Interstate Commerce Law, is evidenced by the numerous instances where it has applied to the Interstate Commerce Commission for relief (United

States *vs.* Adams Express Co., 16 I. C. C., 394; United States *vs.* B. & O. R. Co., 15 I. C. C., 470; United States *vs.* D. & R. G. R. Co., 18 I. C. C., 7; United States *vs.* N. Y., P. & N. R. Co., 15 I. C. C., 233; United States *vs.* A. & V. Ry. Co., 40 I. C. C., 406). In the case last cited the carriers challenged the power of the Commission to require the establishment of a rate on stamped envelopes and stamped newspaper wrappers belonging to the Government and shipped on Government bill of lading, on the ground that the railroads were not common carriers of Government stamped articles but essentially private carriers under special contracts. The Commission held that it had authority to prescribe reasonable ratings for the traffic in question (and did so), but that under section 22 of the act the carrier and the Government could agree upon some other lower rate.

It follows, therefore, that as to property not belonging to the Government but transported on Government bill of lading, the Government stands in the same position as an individual shipper and is obligated by the law to pay the regular published tariff rates.

And instead of the Government being permitted to take advantage of alleged acquiescence of the railroads, as held by the court below, the Interstate Commerce Law estops the final carrier from acquiescence in settlement for transportation of effects and property of Government officers and employees at reduced rates, and estops the Government from setting up any such alleged acquiescence as a bar to recovery of the full tariff rates.

Even if section 22 of the Interstate Commerce Act could be construed to authorize the carriers to contract with the Government for reduced rates on other than Government property—officers' effects, for instance—the situation here would not be changed, for the shipments in question were made expressly at the regular tariff rates. The equalization agreements did not apply, because the property of

officers and employees was not property as to which the Government was *lawfully* entitled to land-grant rates. The regular tariff rates became the *rates fixed by law* and the final carrier could not by settlements, voluntary or otherwise, with the Government officers, waive its right and obligation to collect the full amount.

Nor can it be said that voluntary acceptance by other railroads before the Western Pacific was in existence, of land-grant rates on officers' and employees' effects for years, if such were the fact, operated to establish an understanding or agreement with the Government for such reduced rates, even assuming that such an understanding or agreement would be authorized by section 22. The answer is that such an implied agreement would be contrary to the express contract embodied in the form of Government bill of lading upon which each shipment was made. An implied contract can be raised only in the absence of an express contract.

Nor could such assumed voluntary acceptance of land-grant rates in prior settlements, be projected into later bill of lading contracts as evidencing intent of the contracting parties.

The intention of the parties to a contract is evidenced by the language used. The language of these bills of lading is plain. There is no ambiguity or uncertainty justifying or requiring exploration of extraneous or surrounding circumstances or previous dealings, in order to ascertain the intent of the parties. Each contract called for the rate provided for shipments upon the uniform or standard bills of lading, that is to say, published tariff rates, with the proviso that the Government should have the benefit of rates available to it when shipments were routed over land-grant roads or lines equalizing therewith. Such land-grant rates were available only as to property of the Government.

These distinctions were appreciated and well stated in Pickley *vs.* U. S., 46 Ct. Cls., 77, at 91:

"A custom may be shown to explain a written contract when doubt arises as to the meaning of words or expressions of doubtful character and various senses; in other words, when there is something to explain. But when its provisions are plain and susceptible of but one meaning, no custom or usage can contradict them."

II.

Even aside from the controlling effect of the Interstate Commerce Law, the ruling of the court below will be found, upon analysis of the relations between the Government and the railroads, to be based upon misapprehension.

In the first place, it is to be observed that in none of the opinions of the court below is there recognition of the fact that each bill of lading was a separate and distinct contract definitely fixing the freight charge, that the accomplished bill of lading was expressly made the evidence upon which settlement for the service would be made, and that the freight charge was a liquidated claim or debt. The court below seems to proceed upon the erroneous assumption that the shipments were made without agreement as to the freight charge, and that the so-called voucher was the effective making by the carrier of its charge for the service.

For its own convenience the Government imposed upon the railroads the practice of freight shipments on uniform Government bill of lading, form for which was prescribed by the Comptroller of the Treasury, first in 1907 (14 Comp. Decns., 967).

By acceptance of shipments under that form of bill of lading the railroads waive the right to demand prepayment of the freight charge, either at the time of shipment or before delivery, and after delivery at destination the freight charge becomes a claim of the final carrier against the United States, the amount of which is definitely fixed by the condition on the bill of lading itself that the shipment "shall take the rate provided for shipments made upon the

uniform or standard bills of lading," subject to the further condition that the Government shall have the benefit of rates *available* to it when the shipments are routed over land-grant roads or lines equalizing therewith. Such reduced rates are *not* available in respect of effects or property of officers or employees.

The bill of lading, when accomplished and returned to the last carrier, is made "the evidence upon which settlement for the service will be made," and the last carrier is recognized and designated as entitled to receive payment.

The Government also imposed upon the final carrier as a condition of receiving settlement, the burden of preparing and submitting with the accomplished bill of lading a so-called voucher (form for which was also prescribed by the Comptroller of the Treasury, see *supra*), with the following certificate:

> "I certify that the above account is correct and just; that the services have been rendered as stated; that payment therefor has not been received, and that the rates charged are not in excess of the lowest net rates available for the Government, based on tariffs effective at the date of service."

The question at once suggests itself, What is the function of such voucher?

The function of the voucher cannot be to enlighten the disbursing or accounting officers as to the matters shown on the bill of lading.

Nor can the function of the voucher be to enlighten the disbursing or accounting officers as to the rate, total mileage, or land-grant mileage, if any. The Government officers already have the same information regarding those matters as the officers of the railroads. The rates are contained in published tariffs, copies of which are in the possession of the Government officers. And all information regarding distances and land-grant roads is contained in pamphlets pub-

lished by the War Department, copies of which are also in possession of the Government officers.

And the function of the voucher is not to fix the amount of the claim. As stated before, the amount of the claim is fixed by the published tariffs, subject to proper land-grant deduction, if any, either directly by reason of land-grant mileage involved or indirectly through the equalization agreements. Here, the land-grant factor being eliminated, the published tariff rates were the measure of the amount of the claim.

And the function of the voucher is not to *limit* the carrier to the amount appearing as the amount claimed, like the *ad damnum* clause at common law.

The Government disbursing and accounting officers do not deal with the railroads at arm's length, as it were, and, for the Government, take advantage of the form of the voucher as submitted to escape a just obligation. On the contrary, the duty and endeavor of the Government officers, as well as the representatives of the railroads, is to ascertain the amount legally due. The Government officers take the bill of lading and from their own records make an independent ascertainment of the amount legally due. If they find that the voucher states an amount greater than they find to be lawfully due, they revise it downward. If they find that it states an amount smaller than they find to be lawfully due, they revise it upward. This is recognized practice of long standing. Particular instances of revision upward in settlements of items here involved were testified to by McLean, but ignored in the findings of the court below.

And the function of the voucher is not to determine, or bind the carrier upon, the question of land-grant deduction. On that subject the Government officers have complete and accurate information and revise the voucher upward or downward to what they find to be lawfully and justly due, or, rather, due under decisions of the Comptroller of the Treasury binding upon them.

The certification that the account is correct and true and that the rates charged are not in excess of the lowest net rates available for the Government, is without function—a mere formality. Whether the account is just and true and whether the rates are the lowest net rates available to the Government, are matters to be determined by inspection of the bill of lading, the published tariffs, and the list of land-grant roads, and such inspection is made by the Government officers wholly uninfluenced by the certificate. The certificate, as evidence of any deree, is wholly ignored.

If the voucher state a rate or charge varying from the published tariff applicable or from the lowest net rate available to the Government, the error becomes patent upon inspection of the bill of lading and the published tariffs. If it appear by the bill of lading that the property transported was private effects of an officer or employee, the land-grant factor disappears. If it does not appear by the bill of lading that the property is private property, then the error in a voucher applying land-grant rate, is latent.

In any event, the bill of lading (which is the contract between the parties and "the evidence upon which settlement will be made") is controlling and any error in the accompanying voucher is to be corrected thereby.

Even the certification that payment has not been received, is mere formality, inasmuch as settlement could be had only upon surrender of the accomplished bill of lading. Possession of the bill of lading evidences that payment has not been made.

In the final analysis, therefore, the voucher becomes a mere memorandum and, so far as settlement with the carrier is concerned, might be dispensed with. For the purpose of settlement with the carrier, the accounting or disbursing officers need only the accomplished bill of lading.

The requirement of the voucher seems to be a survival from a former period when a certified statement or account,

and not the bill of lading, was the evidence upon which settlement was made.

And settlements with the carriers are not final or conclusive. It is common practice of the Government, of which the court will take judicial notice, to reopen settlements.

In Comptroller's decision of February 21, 1914 (20 Comp. Decns., 575), it was recognized that the change of ruling therein would apply retroactively to reopen prior settlements and allow full tariff rates on excess over change of station allowance.

III.

In none of Comptroller Tracewell's decisions was there any suggestion of acquiescence by the railroads. On the contrary, his understanding was that he was permitting to be paid to the carriers all that his view as to the construction of the language of the land-grant acts entitled them, and that the carriers had their remedy in the Court of Claims if his rulings were wrong. This is evidenced by his decision of May 12, 1904 (unpublished), in a case involving the fundamental question, wherein he said:

> "The Court of Claims is only in a modified sense bound by these precedents, and if these constructions have been wrong all these years the railroads are not without remedy and have not been for all these years."

The suggestion of "long continued practice of the accounting officers acquiesced in by the carriers generally," was first made in a decision of Comptroller Downey's in 1914. (21 Comp. Decns., 482).

As hereinbefore pointed out, acquiescence has no application here as raising an implied agreement as to rates or as injecting into the bill of lading contracts an intent contrary to the plain language thereof.

The shipments were made upon bills of lading each constituting a separate and distinct contract. The right of ac-

tion upon each of these contracts was separate and distinct. Settlement under one, or any number, at less than the contract rate, could not prejudice the right of action on any other. And outlawry of claim on earlier such contracts could not prejudice the rights of action on the later ones within the period of limitation.

Any defense to the items in suit, therefore, must arise out of the particular contracts under which the shipments were made and the conduct of the parties in connection therewith, and, however phrased, such defense resolves in final analysis into the contention that payment and acceptance in each instance constituted accord and satisfaction.

But, as hereinbefore pointed out, the doctrine of accord and satisfaction, as a defense to freight charges, has been eliminated by the Interstate Commerce Law.

Even aside from the controlling effect of the Interstate Commerce Law, the doctrine of accord and satisfaction would not apply, for there would then be presented the plain case of payment by the Government of less than it contracted to pay in each of the numerous express contracts, without any consideration to the claimant and without any prejudice to the Government.

The contract in each instance called for full tariff rates. Payments were made by Government disbursing officers whose duty was to pay the rates contracted for in each bill of lading, but who were controlled by erroneous decisions of the Comptroller of the Treasury and permitted to pay only land-grant rates.

The Government system of settlement and accounting, and that alone, was responsible for the certification by the claimant's general auditor (who had no authority to depart from the tariff rates fixed and published by its traffic department) of the so-called vouchers, as the condition of receiving payment to the extent to which the Government officers were so permitted to make payment. Any other course would have led to the same result, as conceded by the court below.

The claimant's general auditor signed the certificates to the so-called vouchers, as required by the Government system of accounting; but the certification that the accounts were correct and just was, as we have shown, without function so far as settlement between the Government and the claimant was concerned, and might have been dispensed with. If anything more than formality, it was no more than certification that the account was correct and just in that it was in accordance with the decisions of the Comptroller of the Treasury binding upon the accounting and disbursing officers. At most, it must be regarded as exacted by a situation which amounted to coercion.

And the certification that the rates charged were not in excess of the lowest net rates available to the Government, was true—they were not in excess of, but less than, the rates available to the Government.

And finally (and what would be the controlling consideration if the Interstate Commerce Law had not foreclosed the inquiry) the Government has not been prejudiced by the settlements at land-grant rates. The rates on all the through routes were the same. The railroads were, as shown before, barred by the Interstate Commerce Law from making concession to the Government in respect of shipments of private property; but even if section 22 could be construed to permit such concession, there was in fact none, and it cannot be assumed that any of the railroads would have granted any. The extent of the concession made by them was equalization with rates to which the Government was lawfully entitled on land-grant roads between the terminal points in any case.

If the Interstate Commerce Law were not controlling and the claimant had receipted for the payments as in full, or the so-called vouchers could be regarded as equivalent to such receipts in full, and the claimant had shared the Comptroller's mistake of law, the fact that the Government has not been prejudiced would still be controlling.

The case of Great Northern Ry. Co. vs. U. S., 42 Ct. Cls., 259, is directly in point. There the railway company operated an all land-grant road between two points on which it ran its freight trains; but for its passenger and mail trains it used for a part of the distance a cut-off over a section of non-land-grant road. Under contract with the Postmaster General providing for the statutory rates of compensation (which were subject to land-grant deduction for land-grant distance) the railway company carried the mail over the shorter route embracing land-grant and non-land-grant mileage. The Postmaster General, treating the service as if it were over the all land-grant route, imposed land-grant deduction for the whole distance, and during a period of twenty years made settlements accordingly. The railway company at the times of such settlements receipted in full to the United States therefor and at no time up to the filing of the suit ever formally demanded any additional compensation. An elaborate argument was made for the government, pressing the defenses of estoppel by acquiescence, mistake of law and accord and satisfaction, but the court sustained the claim of the railway company for the additional amount which it would have received (within the period of limitations) if it had been paid the full rate for the non-land-grant mileage, saying:

> "The contention of the defendants that the plaintiff company is estopped by its conduct in accepting the sums offered by the Government in payment of its claims for mail service without a protest, needs but little note. *Estoppel in pais* may be defined to be a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." Citing authorities.
>
> "It is needless to say that the record in this case contains nothing to show that the defendants were in any way misled to their injury by the conduct of the plaintiff. On the contrary, it appears that by the change in the route, so as to pass partly over the non-

> land-grant line, the Government paid less than it would have paid over the continuous land-grant road. Hence no change of position could possibly have been induced by the conduct of the plaintiff to the detriment of the defendants."

It will be observed that the court there held that even mutual mistake of law and receipts in full for a period of twenty years, were ineffectual to bar the claimant from the full compensation to which it was lawfully entitled under its contract.

And Pickley *vs.* U. S., 46 Ct. Cls., 77, hereinbefore cited, is also directly in point. There, as here, the claimant had an express contract, and the Comptroller of the Treasury had rendered a decision controlling the disbursing officer in respect of the amount payable. During the progress of the work payments were made on so-called vouchers in the shape of accounts in which were charged, against compensation earned, certain items of superintendence, inspection and measurement, which the court held were improper charges under the contract. To each of these so-called vouchers was appended a receipt and certificate in the following form: "Received at — this — from — the sum of — in full payment of the above account, which I certify to be correct." The court said (p. 91):

> "It is further contended by the Government that the receipts given by the claimant are an acquittance of any further demand under these contracts, and numerous authorities from our own courts are cited in support of this contention and an equal number from the same courts are cited in opposition. *At the time these receipts were given there was no dispute between the parties as to the amount due the claimant; the Comptroller of the Treasury had decided that the amount received was all that was due, and the paymaster could pay no more, and the claimant knew this. Quite likely he was led to believe that no greater sum was due him, but if so, as we decide, he*

was mistaken. There was no settlement or accord or satisfaction between the parties, because there was nothing to settle and no difference between them to accord, and hence there could have been no consideration for receipting for a sum less than was actually due. Under the authorities, as we understand them, we do not believe that the claimant is barred from recovering the balance which we find was honestly his due under the terms of the contract." (Citing authorities.)

And in Baldwin's case, 15 Ct. Cls., 297, at 303, the governing principles are well and comprehensively stated:

> "There is no principle of the common law better established and more generally recognized than that a payment, which is only in accordance with the terms of the contract and after its maturity, of a part of a liquidated and ascertained debt is no satisfaction in law of the whole indebtedness, and that a receipt in full given upon such part payment is *nudum pactum* as to the unpaid balance, and not binding upon the maker. (Citing authorities.)
>
> "There are some apparent, though not real, exceptions. To make the receipt of a part a discharge of the whole, there must be a new consideration, or a voluntary and well understood compromise of a disputable and disputed claim, by which each party yields something for the concession of the other; or an accord and satisfaction, by which a new contract is substituted, or a submission to arbitration; in each of which cases a consideration is expressed or implied. All the decisions upholding part payment as a discharge of the whole debt have turned upon one or the other of these apparent exceptions. The consideration may be slight, but it must be found to exist; as the payment of a note before its maturity, or by the promise of another party, or in chattels not required by the contract, or in any other manner differing from the original agreement, which may seem to be more beneficial to the payee. (Citing authorities.)

> "In the present case there was no new consideration for the discharge of the whole of the claimant's demand, no voluntary compromise, and no accord and satisfaction, from which a new consideration can be implied. The defendants' officers, having the power, arbitrarily reduced the liquidated debt due the claimant, by deducting from it a sum in set-off, which we have shown was not a legal and valid claim. At that time the money due the claimant had been long overdue, and the defendants did nothing more than to satisfy, to that extent, their long-matured obligations. It was a simple payment of part when the whole was due and ought to have been paid; nothing more. The yielding was all on one side, which renders the receipt *nudum pactum* as to the unpaid portion of the claim."

And on the question of the certification, in the face of the decisions of the Comptroller, of the so-called vouchers at land-grant rates instead of at the full rates, the case of Pennsylvania *vs.* U. S., 36 Ct. Cls., 507, is also in point. There (at page 527) the court said:

> "The doctrine of estoppel for failure to present—a doctrine not favored in the law—cannot be invoked by the party whose officers erroneously decided presentation to be a useless proceeding. Estoppel might arise against a party where his own conduct has caused another to act differently from a course which otherwise such person might pursue without reference to a statute of limitation. It cannot rest by mere silence upon a departmental ruling adverse to jurisdiction, with no additional rights acquired by a claim, and no injury done to the debtor in the meantime."

The cases on the subject of mistake of law, cited by the court below, involved payments made under mistake of law which it was sought to recover back, and have no application here. The claimants here are suing for balances due on

liquidated claims, withheld by reason of erroneous decisions of the Comptroller of the Treasury.

Nor is there here any question of laches. The claim is for causes of action arising within the period of limitation fixed by the Government and covering the whole period of the claimant's dealings with the Government.

And the cases on the subject of payment and acceptance, cited by the court below, are distinguishable from this case and from the cases we have cited.

Baird *vs.* U. S., 96 U. S., 430, was a case of unliquidated claim which had been presented to and audited by the Government and allowed for a sum less than the amount claimed. The claimants were informed of the allowance and the principles upon which the adjustment had been made. Three months later a draft was sent them for the amount found due, which was received and collected without objection. Chief Justice Waite, in the opening paragraph of the opinion, stated the distinguishing principles:

> "It is, no doubt, true that the payment by a debtor of a part of his *liquidated* debt is not a satisfaction of the whole, unless made and accepted upon some new consideration; but it is equally true, that, where the debt is unliquidated and the amount is uncertain, this rule does not apply. In such cases the question is, whether the payment was in fact made and accepted in satisfaction."

In the Railway Mail Service cases, 13 Ct. Cls., 199, improved mail facilities, in accordance with the act of 1873, had been installed on through trains between Philadelphia and Port Deposit, and between Philadelphia and Delmar, which, in the first instance, ran between Philadelphia and Chester, and, in the latter, between Philadelphia and Wilmington, over the main line of the Philadelphia, Wilmington and Baltimore Railroad. The Postmaster General continued to treat the Port Deposit route as terminating at

Chester, and the Delmar route as terminating at Wilmington, and all service between Philadelphia and Chester, and between Philadelphia and Wilmington, as embraced in the main line route, as theretofore. The companies accepted pay under this arrangement for a period, the company operating the Port Deposit route receiving from the main line company its ratable share of the main line pay between Philadelphia and Chester. Later they protested that the Port Deposit route should be regarded as terminating at Philadelphia and receive pay for the distance between Philadelphia and Chester at the same rate as between Chester and Port Deposit, and that the Delmar route should likewise be regarded as terminating at Philadelphia and receive pay for the distance between Wilmington and Philadelphia at the same rate as between Wilmington and Delmar. It will be seen that there was no contract between the parties for the full pay for the overlapping service on the main line, and that this branch of the case did not present the question of departure by the Postmaster General from the terms of an express contract in making payments, as in the later case of the Great Northern Railway Co., *supra*. It was held that the acceptance of the payments evidenced acquiescence in the Postmaster General's adjustment of the routes and the pay thereon and foreclosed claim for any additional compensation for the period prior to protest. When the protests were made such acquiescence was withdrawn and thereafter the case presented a changed aspect.

In the Central Pacific case, 28 Ct. Cls., 427, there was likewise no express contract. The Postmaster General had furnished certain postal employees written authority (termed a commission) declaring that railroads and other mail carriers were required to transport them free. The court held that the railroad company by transporting such employees without objection or claim for fare or compensation, must be held to have acquiesced in the understanding of the Postmaster General that such employees were transported free.

In each of these cases it was noticed that if the railroad companies had made timely protest or objection, the Postmaster General would have had the opportunity of protecting the interests of the Government by some other arrangement, the court saying in the Central Pacific case:

> "If the Post Office Department had been apprised in apt time of the adverse construction of the claimant it would have given it an opportunity of shaping its policy with reference to that construction; but, not having notice of such construction, it had a right to assume from the silence of the claimant that it acquiesced in that view of the railroad's obligation. * * * If a recovery can be had in this proceeding it must be on the basis of contract between the parties. Is it expressed or implied in the transaction that the defendants were to pay for the transportation of such agents? If it is not, then no obligation can arise."

As we have reiterated, we are here concerned with balances due upon diquidated claims under express contracts.

In U. S. *vs.* Garlinger, 169 U. S., 316, this court noticed (p. 320) that it was contended that, from the facts found by the Court of Claims, the law would imply a contract between the claimant and the United States, and that on the part of the United States it was contended that the regulation relied on by the claimant did not constitute an express contract of employment between the parties and that the facts negatived any notion of an implied contract to pay any additional beyond the statutory rate of three dollars per day. After deciding that the regulation invoked did not constitute an express contract nor sustain the claimant's contention of an implied contract, and thus disposing of the case, the court went on to consider the acquiescence of the claimant as also a ground for the same conclusion, holding that such acquiescence, in the absence of a contract, established the agreement of the parties.

The principle of these cases is stated in Hughes *vs.* U. S., 25 Ct. Cls., 472 (syllabus):

> "A receipt in full is but evidence, ordinarily, in the nature of an admission, liable to be explained or contradicted. But in cases, of implied contract, where the consideration is undetermined and the parties may agree upon the price, the receipt in full is an agreement to fix the value of the thing sold, and to consider the price so agreed upon as the full consideration of the contract.
>
> "A payment of a part of a debt is not payment of the whole; but in cases of implied contract there is no whole and no part until the amount is fixed by agreement of parties or the verdict of a jury."

And in *Finney vs. U. S.*, 32 Ct. Cls., 546, where it was said (pp. 554-5):

> "It is well-settled law that where a certain sum is due, payment of a part will not operate to satisfy the whole debt, even where a release of the entire sum is given, unless such payment be made and accepted upon some new consideration (*United States vs. Bostwick*, 94 U. S., 53, 67; *Fire Ins. Assn. vs. Wickham*, 141 U. S., 564, 577).
>
> "And to constitute a new consideration it must be so regarded by both parties, and this was the view of the court in *Philpot vs. Gruninger* (14 Wall., 570, 577), cited with approval in the case of *Fire Ins. Assn. vs. Wickham* (*supra*).
>
> "In this latter case it is further stated that 'to constitute a valid agreement there must be a meeting of the minds upon every feature and element of such agreement, of which the consideration is one.'
>
> "In respect of claims disputed by the Government, there is a class of cases holding in effect that, where a claimant voluntarily submits his claim for adjustment to the proper department or to a board appointed for that purpose, and the amount found due thereby is accepted and a receipt given therefor in full, that bars any further claim (*United States vs. Adams*, 7

Wall., 463, 479; *Mason vs. United States*, 17 Wall., 67; *Murphy vs. United States*, 104 U. S., 464).

"In the latter case, which was a claim for damages growing out of an alleged violation of a contract for excavating a pit for a dry dock, the court held that "acceptance by the claimant, without objection, of the amount allowed by the Secretary of the Navy in his adjustment of the account presented to him was equivalent to a final settlement and compromise of all the items of the present claim included in that account.'

"In the case at bar, however, the claim was not an unliquidated one, as the ascertainment of the amount due was a mere matter of computation, nor was it presented as a disputed claim, so far as it appears from the averments in the petition."

Respectfully submitted.

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Attorney for Appellant.

[redacted]

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE WESTERN PACIFIC RAILROAD COMPANY, Appellant,
v.
THE UNITED STATES.
No. 136.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is similar to the *Oregon-Washington Railroad & Navigation Company* v. *The United States*, No. 134, October Term, 1920, and was decided by the Court of Claims on the same day, May 5, 1919 (54 C. Cls. 131). It was decided upon the authority of *Denver & Rio Grande Railroad Company* v. *The United States* (54 C. Cls. 125), which in turn was decided upon authority of the *Oregon-Washington Railroad & Navigation Company* v. *The United States* (54 C. Cls. 131) and *Baltimore & Ohio Railroad Company* v. *The United States* (52 C. Cls. 468). The only differ-